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FAMG Idaman Resources v Jasmadu Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22C-6–01 OF 2018
LEE SWEE SENG J
20 JULY 2018

C *Civil Procedure — Stay of proceeding — Application for stay to be referred to arbitration — Whether conditions fulfilled to justify stay of proceeding — Whether court should exercise discretion to impose condition on stay of proceeding — Arbitration Act 2005 s 10(1)*

D The plaintiff was a sole proprietor and had filed a claim against the defendant for the amount due to him as the subcontractor for the construction of a building project awarded to it by the defendant as the main contractor. The defendant had in turn been appointed by Dewan Bandaraya Kuala Lumpur ('DBKL') as the employer of the project. The project was with respect to the
E construction of a three storey clinic and one underground floor for use by the Health and Environment Department of DBKL on a piece of land in Taman Tasik Pudu Ulu, Cheras, Kuala Lumpur. The terms of the subcontract were contained in the letter of acceptance of subcontract works issued by the defendant. The plaintiff claimed that he had done work for which he had
F invoiced the defendant to the tune of over RM1m but he had only been paid RM20,000. The plaintiff claimed under three invoices and a debit note for late payment totaling RM1,018,087.23 together with a claim for interest and costs. The issue was with respect to the defendant's application under s 10(1) of the Arbitration Act 2005 for a stay of the proceedings pending reference to
G arbitration as there was a clear arbitration clause in the disputes that had arisen between the parties in the construction contract. The defendant disclosed that the parties were bound by the letter of acceptance and that there was an arbitration agreement in cl 11.8 of the said letter of acceptance binding on the parties. The defendant stated that the plaintiff's claim was with respect to a
H matter covered under the arbitration agreement and as such the proceedings should be stayed pending reference to arbitration as agreed by the parties. The issues were: (a) whether the conditions of s 10(1) of the Arbitration Act 2005 had been fulfilled to justify a stay of the court proceeding; and (b) whether the
I court should exercise its discretion to impose a condition on the stay in that the defendant should proceed with the arbitration within 30 days from the date of order.

Held, allowing the defendant's application:

(1) Once there was an arbitration agreement and that the party applying for stay had not taken any other steps in the proceedings, a stay was mandatory and the court shall grant a stay. It was otherwise if it could be shown that the arbitration agreement was null and void, inoperative or incapable of being performed. It was not in dispute that there was an arbitration agreement and that the defendant had not taken other steps in the proceedings other than entering appearance (see para 20).

(2) The court were left in no doubt that the matter brought before the court concerns the rights and liabilities of the parties under the subcontract as encapsulated in the arbitration agreement. The parties must thus be held to their bargain and the court had no hesitation in granting the stay (see paras 34–35).

(3) There was a need for the applicant who wanted to stay to affirm in their supporting affidavit that at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. The defendant had not stated such a willingness to do all things necessary to the proper conduct of the arbitration, content to let the plaintiff took the proactive move if he was minded doing so. In the event that the defendant should proceed as claimant, any advance in the deposits paid shall be recouped in the arbitral award in the event that it was in favour of the plaintiff, the sums already advanced by the defendant as claimant shall be deducted accordingly and went towards reducing the plaintiff's claim as the respondent in the arbitration as might be ordered by the arbitrator. The court in granting stay was vested with a broad discretion to impose such condition as it might deem fit (see paras 57–59).

[Bahasa Malaysia summary

Plaintif adalah pemilik tunggal dan telah memfailkan tuntutan terhadap defendan untuk jumlah yang terhutang terhadap beliau sebagai subkontraktor bagi pembinaan projek bangunan yang diberikan oleh defendan sebagai kontraktor utama. Defendan pada mulanya telah dilantik oleh Dewan Bandaraya Kuala Lumpur ('DBKL') sebagai majikan projek tersebut. Projek berkenaan adalah terhadap pembinaan klinik tiga tingkat dan satu tingkat bawah tanah untuk digunakan oleh Jabatan Kesihatan dan Alam Sekitar DBKL di atas sebidang tanah di Taman Tasik Pudu Ulu, Cheras, Kuala Lumpur. Terma subkontrak terkandung dalam surat setujuterima kerja-kerja subkontrak yang dikeluarkan oleh defendan. Plaintif mendakwa bahawa beliau telah menjalankan kerja yang mana beliau telah memberikan invois kepada defendan untuk nilai RM1 juta lebih tetapi beliau hanya dibayar RM20,000. Plaintif menuntut di bawah tiga invois dan nota debit untuk pembayaran lewat berjumlah RM1,018,087.23 bersama tuntutan untuk faedah dan kos. Isu adalah berkenaan dengan permohonan defendan di bawah s 10(1) Akta Timbang Tara 2005 untuk penangguhan prosiding sementara menunggu

A rujukan untuk timbang tara kerana terdapat klausa timbang tara yang jelas dalam pertikaian yang timbul antara pihak dalam kontrak pembinaan tersebut. Defendan mendedahkan bahawa pihak-pihak tersebut terikat dengan surat setujuterima dan terdapat perjanjian timbang tara dalam klausa 11.8 dalam surat setujuterima yang mengikat pihak-pihak. Defendan menyatakan bahawa
B tuntutan plaintif adalah berkenaan dengan perkara yang dinyatakan di bawah perjanjian timbang tara dan oleh itu prosiding itu harus ditangguhkan sementara menunggu rujukan kepada timbangtara sebagaimana yang dipersetujui oleh pihak-pihak. Isu-isu tersebut adalah: (a) sama ada syarat-syarat s 10(1) Akta Timbang Tara 2005 telah dipenuhi untuk
C membenarkan penangguhan prosiding mahkamah; dan (b) sama ada mahkamah perlu menjalankan budi bicaranya untuk mengenakan syarat terhadap penangguhan bahawa defendan hendaklah meneruskan timbang tara dalam tempoh 30 hari dari tarikh perintah tersebut.

D **Diputuskan**, membenarkan permohonan defendan:

(1) Apabila terdapat perjanjian timbangtara dan pihak yang memohon untuk penangguhan tidak mengambil langkah lain dalam prosiding tersebut, penangguhan adalah wajib dan mahkamah perlu membenarkan
E penangguhan. Sebaliknya jika ia dapat dibuktikan bahawa perjanjian timbang tara adalah terbatal dan tidak sah, tidak boleh dijalankan atau tidak dapat dilaksanakan. Tidak ada pertikaian bahawa terdapat perjanjian timbang tara dan defendan tidak mengambil langkah lain dalam prosiding selain memasukkan kehadiran (lihat para 20).

F (2) Mahkamah tidak ragu-ragu bahawa perkara yang dibawa di hadapan mahkamah adalah berkenaan dengan hak dan liabiliti pihak-pihak di bawah subkontrak seperti yang terkandung dalam perjanjian timbang tara. Oleh itu, pihak-pihak itu mesti dipegang terhadap tawarannya dan
G mahkamah tanpa was-was untuk memberikan penangguhan (lihat paras 34–35).

(3) Terdapat keperluan bagi pemohon untuk penangguhan bagi mengangkat sumpah afidavit sokongan mereka bahawa pada masa prosiding itu dimulakan dan masih tetap bersedia dan bersanggupan untuk
H melakukan semua perkara yang perlu untuk menjalankan timbang tara. Defendan tidak menyatakan apa-apa kesediaan untuk melakukan semua perkara yang perlu untuk timbang tara yang teratur, memberikan kepada plaintif untuk mengambil langkah proaktif sekiranya beliau berfikiran demikian. Sekiranya defendan meneruskan sebagai penuntut, apa-apa
I pendahuluan dalam deposit yang dibayar akan diterima sebagai award timbang tara sekiranya ia memihak kepada plaintif, jumlah yang telah dikemukakan oleh defendan sebagai penuntut hendaklah ditolak dengan sewajarnya dan seterusnya mengurangkan tuntutan plaintif sebagai responden dalam timbangtara yang mungkin diperintahkan oleh

penimbang tara. Mahkamah dalam membenarkan penangguhan mempunyai budi bicara yang luas untuk mengenakan syarat seperti yang difikirkannya patut (lihat para 57–59).]

Cases referred to

Apex Marble Sdn Bhd & Anor v Leong Tat Yan [2018] MLJU 39, HC (refd)
CM Pillings & Co Ltd v Kent Investments Ltd (1985) 4 ConLR 1; (1985) 30 BLR 80, CA (refd)
Fakes v Taylor Woodrow Construction Ltd [1973] 1 All ER 670, CA (refd)
Gadang Engineering (M) Sdn Bhd v Bluwater Developments Bhd [2010] MLJU 2213, HC (refd)
KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2012] MLJU 839; [2013] 1 CLJ 993, HC (refd)
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005)
Arbitration Act 2005 ss 10, 10(1), (2), 37, 42
Construction Industry Payment and Adjudication Act 2012
Limitation Act 1953 s 6(1)

Muhammad Faizi Tajuddin (Faizul Nasir & Co) for the plaintiff.
William Ch'ng (Terrence & Randy) for the defendant.

Lee Swee Seng J:

[1] The issue before this court was a rather familiar one with respect to the defendant's application under s 10(1) of the Arbitration Act 2005 ('the AA 2005') for a stay of the proceedings pending reference to arbitration as there was a clear arbitration clause in the disputes that have arisen between the parties in the construction contract.

[2] This court in making the stay order had exercised its discretion under s 10(2) of the AA 2005 and imposed a condition that the defendant do proceed with the arbitration within 30 days from the date of the order.

[3] It is against the condition imposed that the defendant had appealed and so this judgment will focus on the reasons for such a condition imposed and for completeness, it shall also deal briefly with the merits for the stay application.

PROJECT

[4] The plaintiff is a sole-proprietor and had filed a claim against the defendant for the amount due to him as the subcontractor for the construction of a building project awarded to it by the defendant as the main contractor. The defendant had in turn been appointed by DBKL as the employer for the project.

[5] The project was with respect to the construction of a three storey clinic and a one underground floor for use by the Health and Environment Department of the Dewan Bandaraya Kuala Lumpur ('DBKL') on a piece of land in Taman Tasik Pudu Ulu, Cheras, Kuala Lumpur.

[6] The terms of the subcontract are contained in the letter of acceptance of subcontract works issued by the defendant dated 5 November 2015 and duly accepted and signed by the plaintiff on 11 November 2015.

[7] The plaintiff claimed that he had done work for which he had invoiced the defendant to the tune of over RM1m but he had only been paid RM20,000. The plaintiff thus claimed under three invoices and a debit note for late payment totaling RM1,018,087.23 together with a claim for interest and costs.

PRAYER

[8] The defendant, had before taking any further steps in the current court proceedings other than entering an appearance by way of filing and serving a memorandum of appearance, applied in encl 6 for an order for a stay of the proceedings in this court pending reference to arbitration under s 10 of the AA 2005.

[9] There was a further prayer that pending the disposal of the application, all proceedings in this suit including but not limited to any ex parte applications be stayed.

[10] In its brief grounds as set out in the application, the defendant disclosed that the parties are bound by the letter of acceptance and that there is an arbitration agreement in cl 11.8 of the said letter of acceptance binding on the parties.

[11] The defendant further stated that the plaintiff's claim is with respect to a matter covered under the arbitration agreement and as such the proceedings in this court should be stayed pending reference to arbitration as agreed by the parties.

[12] Soon after the application for stay was filed on 6 March 2018 in encl 6, the plaintiff's solicitors filed an application in encl 9 on 4 April 2018 to discharge themselves as solicitors for the plaintiff on the ground that the plaintiff had stopped giving instructions to them since 20 March 2018.

[13] On 11 April 2018 when the matter was called up for hearing, the plaintiff's manager, En Faisal bin Mohd Zain was present, and he explained to the court his difficulty in raising the financing to continue with the litigation, much less with the arbitration that the defendant had already applied for.

[14] The court then fixed 23 April 2018 for hearing of both applications and also to allow the plaintiff to engage new solicitors to act for him.

[15] On the date of hearing the plaintiff was present. There was no affidavit filed to oppose the application for stay.

[16] After hearing the parties the court granted a stay of the current proceedings with costs of RM5,000 to be paid by the plaintiff and also in the exercise of its discretion under s 10(2) of the AA 2005 imposed a condition that the defendant do proceed with arbitration within 30 days from the date of the order.

PRINCIPLES

[17] Section 10 of the Arbitration Act 2005 provides as follow:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a *matter* which is the *subject of an arbitration agreement shall*, where a party makes an application *before taking any other steps in the proceedings, stay* those proceedings and *refer the parties to arbitration* unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) The Court, in granting a stay proceeding pursuant to subsection (1), may impose any conditions as it deems fit. (Emphasis added.)

[18] It is clear that, if the defendant that is being brought to court, has not taken any other steps in the court proceedings, the court shall grant a stay of the proceedings, if there is an arbitration agreement to refer the matter to arbitration.

[19] The exception is when the said arbitration agreement is null and void, inoperative or incapable of being performed, then the court would not grant a stay of the proceedings and the parties in such an instance would have to proceed with litigation in court.

A WHETHER THE CONDITIONS OF S 10(1) OF THE AA 2005 HAVE BEEN FULFILLED TO JUSTIFY A STAY OF THE COURT PROCEEDINGS

B **[20]** The mandatory nature of the new s 10 of the AA 2005 had been highlighted in a number of cases. The current position is that once there is an arbitration agreement and that the party applying for stay has not taken any other steps in the proceedings, a stay is mandatory and the court shall grant a stay. It is otherwise if it can be shown that the arbitration agreement is null and void, inoperative or incapable of being performed. Here it is not in dispute that there is an arbitration agreement and that the defendant had not taken other steps in the proceedings other than entering an appearance.

D **[21]** Whilst under the old Arbitration Act 1952 ('the AA 1952') the word used was 'may', under the new Arbitration Act 2005 the word used is now 'shall', signifying a clear shift towards referring such a matter to arbitration and indeed making it mandatory as opposed to the old Arbitration Act 1952 where the discretion is reposed with the court on whether or not to grant stay. This was once again emphasised in the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 as follows:

E [31] Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 ('the 1952 Act'). The issue of stay of proceedings in the 1952 Act was dealt with under s 6 thereof which reads:

F > If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, *may make an order staying the proceedings.*

H [32] The clear effect of the present s 10(1) of the 2005 Act is to render a stay *mandatory* if the court finds that all the relevant requirements have been fulfilled; *while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise*. (Emphasis added)

I **[22]** There was a further significant element introduced in an amendment in 2011 to the new s 10(1) of the AA 2005 such that what was once a 'dispute' before there could be a reference to arbitration is now mellowed and watered down substantially to just a mere 'matter' that is the subject of claim covered in the arbitration agreement.

[23] In the *Press Metal Sarawak Sdn Bhd*'s case the Federal Court explained as follows: A

> [28] The present s 10(1) of the 2005 Act (as amended vide Act A1395 which came into force on 1 July 2011 (the 2011 Amendment)) reads:
>
> > 10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. B
>
> [29] Prior to the 2011 Amendment, s 10(1) provided as follows: C
>
> > 10 Arbitration agreement and substantive claim before court
> >
> > (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds — D
> >
> > (a) that the agreement is null and void, inoperative or incapable of being performed; or
> >
> > (b) *that there is in fact no dispute* between the parties with regard to the matters to be referred. E
>
> [30] Paragraph (b) of s 10(1) was completely repealed by the 2011 Amendment. *Previously, there must be in existence a dispute between the parties with regard to the matter to be referred,* before a court is empowered to make an order under s 10(1). With the deletion of para (b) the only remaining exception under the present s 10(1) is that the arbitration agreement between the parties is null and void, inoperative or incapable of being performed. F
>
> ...
>
> [33] What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. *The court is no longer required to delve into the details of the dispute or difference* (see *TNB Fuel Services Sdn Bhd*). In fact *the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.* (Emphasis added.) G H

[24] The significance of the shift in stance was also appreciated by the court in *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2012] MLJU 839; [2013] 1 CLJ 993 where this significant difference leaning towards upholding an arbitration agreement was underscored and correspondingly a stay of court proceedings would ordinarily be granted: I

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> 16 It is also evident with the amendment that it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, 'null and void, inoperative or incapable of being performed'.
>
> 17 It is no longer possible to argue that in respect of the controversy between the parties there is no 'dispute' with regard to the matter to be referred to arbitration, which is a test which invites unnecessary ambiguity and requires the court to determine whether there is a 'dispute' between the parties not dissimilar to the function performed by the court in determining whether there is a triable issue in a summary judgment application. *The test is now simpler test of whether the matter before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, if will become a matter of construction of the relevant arbitration agreement, where it exists*. (Emphasis added.)

B

C

[25] I noted that the defendant was very coy about whether or not the amount claimed is owing except for saying in para 13 of its further affidavit that the plaintiff is not entitled to the sum of RM1,018,087.23 claimed based of the letter of acceptance for the reasons given in the said affidavit which included the defendant's claim arising out of the LAD for late completion and the additional costs in engaging a rescue subcontractor to complete the project. The defendant was careful to state that they would only be disclosing so much of their defence as in relevant and necessary for the stay application. However, short of an expressed admission, a stay of the proceedings pending reference to arbitration would invariably be granted as the matter appears to be covered by the broadly worded arbitration clause. See by analogy the case of *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 decided under the AA 1952 and the dictum of Peh Swee Chin J at p 461 para B right hand column I 'In my view short of an admission of liability, a dispute has already arisen in this case'.

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[26] The arbitration agreement in cl 11.0 of the letter of acceptance reads as follows:

> If any *dispute or difference* shall arise between the parties *involving any clause or matter whatsoever* herein contained or the operation or *rights, duties or liabilities of either party under or in anyway concerned with this Sub-Contract,* then and in every such case the dispute or difference shall be referred and settled by arbitration in accordance with or subject to the provisions of the Arbitration Act 2006 or any statutory modification or re-enactment thereof for the time being in force.
>
> All *reasonable attempts* shall be made by the parties to this Sub-Contract to *amicably settle any dispute, controversy or claim arising out of this Sub-Contract*, before referring such dispute to arbitration. (Emphasis added.)

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[27] It cannot be gainsaid that the scope of the arbitration agreement is broad enough to cover the dispute herein with respect to the plaintiff's entitlement to payments under the subcontract.

[28] The plaintiff's entitlement to payment is governed by cl 5.0 which 'payment terms shall be on pay when paid basis which Jasmadu Sdn Bhd will pay you when (it) received payment from Dewan Bandaraya Kuala Lumpur'. A

[29] The plaintiff had stated in its statement of claim that the defendant had received the payments from DBKL. B

[30] At any rate, in its further affidavit, filed at the direction of the court, the defendant further stated that the plaintiff was required to complete the project by 16 May 2017 and that as at 8 June 2017 the works completed for the project was a mere 27.71%. C

[31] The defendant further stated that there was excessive and inexcusable delay which constituted a breach of the terms of the letter of acceptance and the defendant therefore had to terminate the contract on 1 August 2017. D

[32] The defendant further stated in its affidavit in support of the application for stay of the proceedings that arising out of the delay in completing the project the defendant has suffered loss and damage consisting of the following: E

(a) the defendant has to bear LAD with respect to DBKL under the main contract; and

(b) the defendant has to incur additional heavy costs to appoint a new subcontractor to complete the project. F

[33] The defendant has to bear the losses arising out of third parties' claim such as suppliers of construction materials for the project. The defendant further stated that by virtue of the above the plaintiff has no right at all to claim the sum of RM1,018,087.23 based on the terms of the letter of acceptance. G

[34] I am left in no doubt that the matter brought before the court concerns the rights and liabilities of the parties under the sub-contract as encapsulated in the arbitration agreement. H

[35] The parties must thus be held to their bargain, whatever may be their perceived advantages of arbitration as opposed to litigation, and I had no hesitation in granting the stay. I

A WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO IMPOSE A CONDITION ON THE STAY IN THAT THE DEFENDANT SHOULD PROCEED WITH THE ARBITRATION WITHIN 30 DAYS FROM THE DATE OF THE ORDER

B **[36]** I appreciate that ordinarily it is the plaintiff that should be the one to proceed with the arbitration since it is the one that has filed this claim in this court. However I must not be oblivious to the current dilemma that the plaintiff is confronted with. He has done some work, according to the defendant only some 27.71%. He is out of pocket and if what he is claiming is C anything to go by and the defendant has so far not deny owing the sum claimed, then it is not difficult to imagine the financial straits the plaintiff has found himself to be in.

D **[37]** This subcontract appears to be a total sub wherein the plaintiff was required to undertake the whole of the works for the sum as stated in cl 1.0 that DBKL had awarded the said project to the defendant by their letter of award Ref:(9)dlm.DBKL/JP/02/1010/2015/A183 JLD 2 also dated 5 November 2015 and that the defendant in turn awarded the same to the plaintiff on a back E to back basis on all aspects. Further cl 3.0 provides as follows:

> The Sub-Contract Sum shall be the amount awarded by Dewan Bandaraya Kuala Lumpur to Jasmadu Sdn Bhd with a discount of 6% and across the board for all items EXCEPT Provisional Sum.
>
> F For Provisional Sum, the discount rate is 0.5% if the works are carried out by other sub-contractor. However, if Jasmadu Sdn Bhd is awarded the Provisional Sum, the discount is at 6% of the awarded Provisional Sum to Jasmadu Sdn Bhd.

[38] Further in cl 14.0 it is provided as follows:

G > Dewan Bandaraya Kuala Lumpur's Letter of Acceptance awarded to Jasmadu Sdn Bhd (Ref:(9)dlm.DBKL/JP/02/1010/2015/A183 JLD 2 dated 05th November 2015) shall form part (of) the contract.

[39] All too often subcontractors in the Malaysian construction industry are H required to finance the entire project with the main contractor flipping the whole of the main contract to the subcontractors who must then raise the financing to do the work and hopefully they are paid on time.

[40] The Construction Industry Payment and Adjudication Act 2012 was I introduced to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication and to provide remedies for the recovery of payment in the construction industry, with particular focus on the case contractors and subcontractors who have done the work and have not been paid.

[41] The plaintiff's solicitors have of course, used an euphemism common in many an application to discharge themselves as solicitors for their client, that they have not been able to get instructions from the client. That is often, as in this case, more a case where the client could not pay its solicitors for the legal fees.

[42] The court can take cognisance of the fact that while legal aid is available to the impecunious litigant who lacks the financial means and who meets the means tests for eligibility for aid as may be stipulated by the Legal Aid Foundation set up under the auspices of the Attorney General's Chambers, there would be those who do not qualify like the contractor here and more so, when it comes to arbitration, there does not appear to be any legal aid that the Legal Aid Foundation would assist with.

[43] The learned authors Mustill and Boyd in their masterpiece entitled *Commercial Arbitration* (2nd Ed) Butterworths, 1989 had observed with much discernment at pp 481–482 as follows:

> For all its advantages of informality and expertise, an arbitration can be a more costly proceeding than a High Court action. Unlike the Court, the arbitrators require payment for their services, and a hearing by a tribunal of arbitrators is not the cheapest way of resolving a small dispute. … It is, however, clear that additional expenses is not a decisive factor, if indeed it is a factor at all, in the refusal to grant a stay. *The fact that the person resisting a stay is too poor to sustain the extra expense of an arbitration, or cannot obtain legal aid for the purpose, is equally immaterial, except perhaps in the case where there is evidence that the wrongful conduct of the defendant is itself responsible for the plaintiff's poor financial position*. (Emphasis added.)

[44] The learned authors referred to the Court of Appeal case of *Fakes v Taylor Woodrow Construction Ltd* [1973] 1 All ER 670 where the appellant/plaintiff had sued in the court below for sums due to him as a plumber for plumbing works done as a subcontractor for the main contractor. The plaintiff was a legally aided litigant having become insolvent because of what he said was non-payment by the defendant for the works done. There was an arbitration clause and the judge allowed a stay. On appeal the Court of Appeal allowed the appeal by a majority and ordered the action to continue and that there should be no stay. Lord Denning MR with characteristic clarity set forth the arguments as follows at p 673:

> … One of the objects of legal aid is to remove the reproach that 'there is one law for the rich and another for the poor'. It is bad enough for a poor man to be faced with an arbitration clause, usually in a printed form which he has never read. *It is much worse if the courts then insist that he is to go off to arbitration where there is no legal aid. That would mean that he is denied a remedy simply because he cannot afford it. The rich man, who can afford arbitration, has his remedy there. The poor man, who cannot afford arbitration, has no remedy. That will not do. If the poor man cannot afford arbitration, he should not be compelled to go there. He should be allowed to continue his action in the*

courts which is the only place where he can obtain justice, situated as he is.

Apart from this, however, this case is quite distinguishable from *Smith v Pearl Assurance Co Ltd*. Mr Fakes says that his misfortune and in particular, his insolvency, has been brought about by Taylor Woodrow's breaches of contract, in that they did not give him the work as and when they should: so they did not pay him as and when they should. It would be indeed 'the most unkindest cut of all' if they in the first place break their contract and by doing so make him insolvent, and then in the second place say to him, 'owing to your insolvency, which we have brought about, we are going to make you go to arbitration, which you cannot afford' ... (Emphasis added.)

[45] Whilst the plaintiff here is not insolvent though in dire financial straits as in not been able to object to his solicitors discharging themselves from acting for him, this court must nevertheless take judicial cognisance of the underlying philosophy of legal aid and even judicial notice that much more costs would be incurred for resolving a dispute of this nature through arbitration and to impose a reasonable condition on the conduct of the arbitration bearing in mind that it cannot be conclusively stated at this stage that the defendant's conduct had caused the plaintiff to be financially challenged whilst at the same time realistically considering that some work had been done by the plaintiff even by the defendant's own admission to the tune of 27.71% for which he had claimed slightly over RM1m.

[46] If the court were to leave it to the plaintiff to proactively proceed with and pursue arbitration, I foresee that probably nothing would move for a long time until financing is available. This is where the justice of the order for stay may be tampered with some conditions with respect to which party should proceed first to arbitration and an appropriate time frame for the notice of arbitration to be served. The rationale for an appropriate condition that can be framed and fashioned in the follow on of a stay order shall be further explored.

[47] Clearly, this is a case where the defendant had exhibited an equal desire to proceed to have their claim arbitrated whether it is a case where they raise their claims as a set-off and counterclaim or that they proactively proceed with their counterclaim as a claimant.

[48] If indeed the defendant has been paid by DBKL then compared with the plaintiff, they have a deeper pocket to fund the arbitration. The defendant is not saying that they would not be claiming if the plaintiff is not claiming.

[49] By all indications the defendant appears to be saying that their claim would be more than the plaintiff's claim which is why the defendant said that they do not owe the plaintiff the sum claimed by the plaintiff.

[50] This court does not encourage a situation where a few years down the road the plaintiff would apply to have the proceedings herein reinstated and continued on ground that whilst they do not have the financial means to proceed with arbitration, the defendant nevertheless was disinterested in proceeding though on affidavit they seem to suggest they have a valid counterclaim for a much bigger sum considering the LAD that DBKL would impose on it and the additional expenses in engaging a rescue contractor to complete the project.

[51] All too often contractors have agreed to the standard clauses on reference to arbitration without the advice from their solicitors that times have changed and that the courts now are far more efficient than what it used to be some ten years ago such that by and large, most cases would be completed within 9–12 months from the date of filing of the claim and cases that are completed after that would have come under the radar so to speak where the managing judge would be monitoring the progress to completion with keen interest. Indeed the cases not completed by then would be stated in the monthly status report that is now part and parcel of the court's reporting system where accountability and efficiency is concerned.

[52] Little wonder that many construction lawyers have advised their clients to do away with arbitration clauses especially where all the parties are domestic parties. Whatever may be the perceived merits of party autonomy and confidentiality, they are superseded by speed of disposal and the ability to canvass all grounds on an appeal with respect to proceeding in court unlike a setting aside under s 37 of the AA 2005. With the deletion of s 42 of the AA 2005, doing away with setting aside on a question of law that would substantially affect the rights of one or more of the parties to the arbitration it appears that one would have to live with any error of law made by an arbitrator. See s 12 of the Arbitration (Amendment) (No 2) Act 2018 which deleted s 42 of the AA 2005.

[53] In a case where no time frame is fixed for reference to arbitration, parties may drag their feet only to come back years later and say that as neither party has proceeded with arbitration, the court should allow them to proceed with the litigation that was once stayed pending reference to arbitration. One party like the plaintiff might lack the financial means to proceed with arbitration and the other the defendant might not be so keen after all if they have to be the claimant to proceed with their claim.

[54] Looking at for example the Asian International Arbitration Centre ('AIAC') Arbitration Rules, under r 14, any deposit to the costs of the arbitration including the fees of the arbitral tribunal and administrative costs shall be paid by the parties in equal shares. It is further provided in sub-r 7 that

if the required deposits are not paid in full, the Director of AIAC shall so inform the parties in order that one or another of them may make the required payment for otherwise the arbitral proceedings shall be suspended or terminated.

[55] Taking the AIAC Arbitration Rules as an example, in Part III Schedule 1(B) thereof under 'B. Domestic Arbitration' it is provided as follows where an arbitration fees is concerned. For the amount in dispute from RM300,001 to RM1.5m the arbitrator's fees is RM24,300 + 3.1667% of the excess over RM300,000 giving a sum of RM24,300 + RM22,739.67 = RM47,039.67 based on the plaintiff's claim of RM1,018,087.23. As for the AIAC administrative fees it is RM8,600 + 0.625% of excess over RM300,000 giving a sum of RM8,600 + RM4,488.05 = RM13,088.05.

[56] That is certainly no small sum for a person like the plaintiff to cough out just to commence and complete the arbitration even by paying his equal shares of the amount.

[57] I appreciate that under the old AA 1952 there was also the need for the applicant who wanted a stay to affirm in their supporting affidavit that at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration as required under s 6 of the AA 1952. The defendant/applicant has not stated such a willingness to do all things necessary to proceed with the proper conduct of the arbitration, content to let the plaintiff take the proactive move if he is minded to do so.

[58] In the event that the defendant should proceed as claimant, any advance in the deposits paid shall be recouped in the arbitral award in the event the award is in its favour and in the event that it is in favour of the plaintiff, the sums already advanced by the defendant as claimant shall be deducted accordingly and go towards reducing the plaintiff's claim as the respondent in the arbitration as may be ordered by the arbitrator. This would overcome the conundrum of neither party not proceeding with the arbitration that the defendant now says the plaintiff must proceed to which the plaintiff had informed the court that he does not have the means to do so.

[59] Whilst such a requirement is not expressly stated in the new s 10 of the AA 2005, nevertheless the court in granting stay is vested with a broad discretion to impose such condition as it may deem fit. The learned authors Mustill and Boyd at p 474 observed as follows:

> ... *the applicant must show that he does not intend simply to use the arbitration as a means for postponing or preventing the resolution of the dispute*. Manifestly, an applicant who intends to block the progress of arbitration by refusing to appoint an

arbitrator in circumstances where the Court has a residual jurisdiction to appoint one on his behalf, can not obtain a stay. The same result will apply in cases where the delay by the applicant is so great as to justify the inference that he does not really wish the arbitration to be effective. (Emphasis added.)

[60] Further at pp 482–483 the learned authors Mustill and Boyd reiterated as follows:

The grant or refusal of a stay does not necessarily amount to a final choice of the tribunal which is to determine the issues in the dispute. By virtue of its residual jurisdiction, the Court has power to take a dispute back into its hands, where the conduct of the arbitration has run into difficulties. It also has power to modify the terms of any stay which it has granted.

[61] Whilst it is too early a stage to gather any less than appropriate bona fide conduct on the part of the defendant/applicant, this court under its broad discretion under s 10(2) of the AA 2005 is nevertheless empowered to impose conditions to ensure that 'the party seeking the stay will proceed expeditiously with the arbitration and to test the readiness and willingness of his intentions', as noted by the learned authors Sundra Rajoo and WSW Davidson in *The Arbitration Act 2005* Sweet & Maxwell Asia 2007 at para 10.11 at p 30.

[62] Some conditions that the court have imposed before depending on the factual matrix of each case are like that in *CM Pillings & Co Ltd v Kent Investments Ltd* (1985) 4 ConLR 1; (1985) 30 BLR 80 where the stay was made conditional upon the defendant providing security by way of a bank guarantee for the amount claimed for summary judgment.

[63] In *Gadang Engineering (M) Sdn Bhd v Bluwater Developments Bhd* [2010] MLJU 2213 the High Court in granting a stay of the proceedings pending reference to arbitration imposed a condition that the arbitration proceedings be completed within one year failing which the plaintiff be at liberty to proceed with the summary judgment application in encl 18. See also the case of *Apex Marble Sdn Bhd & Anor v Leong Tat Yan* [2018] MLJU 39, where the High Court imposed under s 10(2) of the AA 2005 a condition that in the arbitration proceedings, the defendant is precluded from raising the defence of limitation under s 6(1) of the Limitation Act 1953.

[64] Seeing that the defendant is as eager as the plaintiff, if not more eager as the losses it said it would suffer would more than cancel the plaintiff's claim, I think this is a fit case where the defendant should proceed with arbitration of the matter with all due despatch.

PRONOUNCEMENT

[65] I had therefore made an order that the present court proceedings be stayed and that the defendant do proceed with arbitration within 30 days from the date for the order.

[66] In the event that the defendant needed an extension of time they are at liberty to apply and in the event that they are not keen to proceed to claim their losses arising out of what they said is the plaintiff's breach unless it is the plaintiff that has first proceeded with the arbitration, they are also at liberty to apply to vary the condition of the stay order accordingly.

[67] I had also ordered costs of RM5,000 to be paid by the plaintiff to the defendant as applicant.

[68] Liberty to apply.

POSTSCRIPT

[69] The learned authors Mustill and Boyd at p 483 has this reminder when an order for stay is made pending a reference to arbitration:

> *The order should always contain a liberty to apply. It provided a convenient means of enabling the Court to take the dispute back into its own hands, if the arbitration completely breaks down or if a condition incorporated in the order is not complied with*. Similarly, *it enables the Court to vary the terms on which the stay was originally granted*. The liberty also enables the Court to grant ancillary relief, such as an injunction, which the arbitrator has no power to award. (Emphasis added.)

[70] Administratively where file and case management is concerned, once a stay is granted pending reference to arbitration, the writ action is considered disposed of. Therefore should the file or case be reactivated again because for some reasons the arbitration could not proceed, or that 'the arbitration agreement has become incapable of being performed' or that the conditions imposed under s 10(2) of the AA 2005 for the stay have not been complied with by the party or parties required by the court to do so, the parties may apply to the court to reinstate the case for continued hearing in the court. That being the case, it behooves that the parties cannot luxuriate and linger longer than necessary for to do so would saddle the court with an old matter that had already been disposed of with the stay pending reference to arbitration on the understanding that the parties would proceed with all expeditious despatch with the arbitration which benefits the defendant/applicant had so ardently extolled.

[71] It would thus be a case where courts granting a stay order pending reference to arbitration would require one or both the parties to comply with the relevant timetable at least where the issuance of the notice to arbitrate is concerned so that the arbitration should at least commence with all due despatch and diligence.

Defendant's application allowed with costs of RM5,000 paid by the plaintiff.

Reported by Mohd Kamarul Anwar